78-1019



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No.

NORA SWAFFORD,

Petitioner,

versus

DICK AVAKIAN,

Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

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No.

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NORA SWAFFORD,
Petitioner,

versus

DICK AVAKIAN,
Respondent.

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in Case No. 78-1803, entered October 16, 1978.

## CITATIONS TO OPINIONS BELOW

The order of the District Court for the Northern District of Georgia granting Respondent's motion to

dismiss, and the judgment of said court dismissing the case, both entered on March 17, 1978, are unpublished, but are reprinted in Appendix A, *infra*.

The opinion and judgment of the Fifth Circuit Court of Appeals, entered October 16, 1978, affirming the judgment of the lower court, is published at 581 F.2d 1224 and is reprinted in Appendix A, *infra*.

## JURISDICTIONAL STATEMENT

The judgment of the Fifth Circuit Court of Appeals was entered on October 16, 1978. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED FOR REVIEW

(1) Whether the Circuit Court erred in holding that the Georgia Long-Arm Statute afforded no *in personam* jurisdiction over Respondent in a suit by Petitioner for breach of marriage promise and fraud.

(2) Whether a proposed contract of marriage made by means of long-distance telephone calls and letters transmitted in the United States Mail from a resident of the State of California and accepted by a resident of the State of Georgia by long-distance telephone, to be performed in California, constituted sufficient minimum contacts with Georgia to invoke the jurisdiction of the Georgia District Court under that



State's Long-Arm Statute [Ga. Code Ann. §24-113.1] in a suit for breach of marriage promise and fraud.

## STATUTES INVOLVED

Ga. Code Ann. §24-113.1(a), (b), (c)

> *Personal jurisdiction over non-residents of State.* — A Court of this State may exercise personal jurisdiction over any non-resident, or his executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use or possession enumerated in this section, in the same manner as if he were a resident of the State, if in person or through an agent, he:
>
> (a) Transacts any business within his State; or
>
> (b) Commits a tortious act or omission within this State, except as to a cause of action for defamation of character arising from the act; or
>
> (c) Commits a tortious injury in this State caused by an act or omission outside this State, if the tortfeasor regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State. . .

## STATEMENT OF THE CASE

In January of 1976, NORA SWAFFORD, a divorcee with three children, was employed as a public relations and social clinical worker with a medical group in Fresno, California. In the course of her employment, she came in contact with DICK AVAKIAN when assigned to handle a dispute which had arisen over medical expenses incurred by AVAKIAN's deceased wife while under the treatment of the medical group.

MRS. SWAFFORD resolved the problem to the satisfaction of AVAKIAN, and soon thereafter, he began dating MRS. SWAFFORD and entertaining her in considerable style. The friendship of the parties blossomed into a romance and AVAKIAN finally proposed marriage, which MRS. SWAFFORD accepted.

The parties continued their courtship for some time, but AVAKIAN would never follow through with his proposal. Finally, MRS. SWAFFORD became disenchanted with the whole situation, and left California to return to her native State of Georgia, arriving there on April 9, 1977.

No sooner did MRS. SWAFFORD arrive in Georgia, but AVAKIAN began to beseige her with telephone calls and several letters wherein he apologized for his past unseeming attitude toward her, reaffirmed his love and again proposed marriage. Finally, on May 9,



1977, her fears and skepticism allayed by the vigor of his supplications, MRS. SWAFFORD agreed, during a long-distance telephone conversation with AVAKIAN, to marry him. At the time the proposal was made and accepted, AVAKIAN resided in California and MRS. SWAFFORD resided in Georgia.

On June 3, 1977, MRS. SWAFFORD left her home in Georgia, in a new automobile purchased by AVAKIAN, and returned to California with her three children and personal effects, pursuant to AVAKINA'S instructions.

Upon her arrival in California, some five days later, AVAKIAN warmly welcomed MRS. SWAFFORD and her children and insisted that they move into his commodious home immediately, as the marriage ceremony would be performed without delay. During the month of June, an engagement party was given and MRS. SWAFFORD was the recipient of an expensive engagement ring. AVAKIAN discussed setting up a trust fund for MRS. SWAFFORD'S children and even suggested that she go to the courthouse to change her mailing address for child support payments and give information of her future name change, to be effective upon marriage.

About two weeks passed, but no wedding date was ever mentioned. MRS. SWAFFORD broached the subject several times, but no response was forthcoming. Finally, on June 30, 1977, she attempted to discuss the

subject again but, to her surprise, received only a cruel rebuff from AVAKIAN, who informed her that the engagement was off and that she should go back to Georgia and live with her family. The next day MRS. SWAFFORD and her children set out for another cross-country trek back to Georgia.

On November 9, 1977, MRS. SWAFFORD filed a two count complaint for damages against AVAKIAN in the United States District Court for the Northern District of Georgia, Rome Division. Count One sounded in contract for a breach of a marriage promise under Georgia law; Count Two sounded in tort for fraudulent misrepresentation.

AVAKIAN was served in California on December 16, 1977, personal jurisdiction being predicated upon Georgia Long-Arm Statute (Ga. Code Ann. §24-113.1). After service, AVAKIAN filed a motion to dismiss the complaint, contending that the Georgia statute did not confer jurisdiction upon the district court under the facts of the case, a position which the district court sustained, by order dated March 17, 1978.

An appeal was thereafter taken to the Fifth Circuit Court of Appeals, which subsequently affirmed the judgment of the district court on October 16, 1978.



## REASONS FOR GRANTING WRIT

### A. The Fifth Circuit Court Of Appeals Rendered A Decision In Conflict With Previous Decisions Of That Court And The U. S. Supreme Court, And In So Doing, Decided An Important State Question In A Way That Conflicted With Applicable State Law.

The instant case seeks clarification of the power of a Georgia District Court to exercise *in personam* jurisdiction over a non-resident (in this case, a Californian), under the provisions of the Georgia Long-Arm Statute (Ga. Code Ann. §24-113.1).

By affirming the district court's judgment of dismissal of the complaint, the Fifth Circuit held that there were insufficient contacts to invoke jurisdiction under subsection (a) of the Georgia Statute, as regards the breach of contract count thereof, or under subsection (b) and (c), as regards the tort count thereof.

Recognizing that the instant case lies in the grey areas of the law, and that the "minimum contacts" test set out in *International Shoe Company v. Washington*, 326 U.S. 316, 66 S.Ct. 158 (1945) cannot be applied mechanically, Petitioner nonetheless submits that the Fifth Circuit lost sight of the "affiliating circumstances" in the case at bar and disregarded the number and quality of contacts present, relying instead

upon a restrictive catagorization of these contacts as "non-commercial".

In its decision, the Fifth Circuit relied upon this Court's recent decision in *Kulko v. Superior Court of California In and For the City and County of San Francisco*, ____ U.S. ____, 98 S.Ct. 1690 (1978), wherein a distinction was purportedly made between commercial and non-commercial activities for the purposes of determining the scope of a state's long-arm statute.

Admittedly, several of the contacts in the instant case can be denominated "non-commercial", however, the *Kulko* case (supra) and the Georgia statute, as interpreted by the Georgia Courts, do not prohibit the exercise of long-arm jurisdiction simply because the case may contain non-commercial aspects.

The Georgia courts have not interpreted Ga. Code Ann. §24-113.1 as restrictively as the Fifth Circuit. In the leading case of *Shellenberger v. Tanner*, 138 Ga. App. 399, 227 S.E.2d 266 (1976), a three prong test was proposed, based upon a "fleshing out" of the skeleton of *International Shoe* (supra) with the holdings in *Hanson v. Deckla*, 357 U.S. 235, 78 S.Ct. 1220 (1958) and *McGee v. International Life Insurance Company*, 355 U.S. 220, 73 S.Ct. 199 (1957). Although discussion of §24-113.1 revolved mainly around subsection (b) of the statute, subsection (a) was also considered, as in apparent from the court's holding that:



> When a nonresident engages in some activity with or in the forum, even a significant single transaction, whether he be physically present there or not, and as a result business is transacted or a tortious injury occurs, a jurisdictional "contract" exists between that nonresident and the forum. (138 Ga. App. 399, at 408).

Said holding is in discord with the Fifth Circuit's reliance upon the fact that "[a] contract was not sent into Georgia by appellee nor was a contract executed, notarized and sent back to appellee as was the case in *Thorington*[1]." *See: Swafford v. Avakian*, 581 F.2d 1224, 1227 (5th Cir. 1978).

The Fifth Circuit has overlooked the fact that AVAKIAN'S contract with MRS. SWAFFORD was purposeful and that it resulted in the consummation of an act (i.e., the making of contract to marry) beneficial to AVAKIAN. Under *Shellenberger* (supra) and *Thorington v. Cash*, 494 F.2d 582 (5th Cir. 1974), the contacts in the case *sub judice* certainly satisfied the *International Shoe* test as to quantum. Furthermore, AVAKIAN'S act of sending MRS. SWAFFORD funds sufficient to purchase an automobile provide a commercial aspect to the case. Therefore, the only remaining question is whether or not the contacts aforesaid were "reasonable".

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1 *Thorington v. Cash*, 494 F.2d 582 (5th Cir. 1974), a case relied upon by Petitioner in the court below, but which was distinguished in the Court's opinion.

Petitioner submits that the "reasonableness" test is not required to be applied in non-commercial transactions with the same orthodoxy required in commercial transactions. The net result of the "minimum contacts" should be scrutinized, as well as the nature of the contacts themselves, which, in the case *sub judice*, were the sole and proximate cause of the trip across the United States to California in an automobile paid for by AVAKIAN. A mere finding that a case is "non-commercial" cannot dispose of the "reasonableness" issue.

A final consideration, completely overlooked by the Fifth Circuit, is that Petitioner's cause of action lies under the common law and independent of statute in Georgia[2], but does not exist at all in the State of California[3]. If jurisdiction over AVAKIAN is not afforded to Petitioner, her right to atonement for the injury sustained will be utterly destroyed. This is a factor which should be, but was not, considered in determining the reasonableness of a contact with the forum state.

## CONCLUSION

For the reasons stated hereinabove, this Petition for a Writ of Certiorari should be granted to review the judgment of the Fifth Circuit Court of Appeals.

---

2 *Spence v. Carter*, 33 Ga. App. 279, 125 S.E. 883 (1924)

3 California Civil Code §43.5(d)



Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served three (3) copies of the within and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit upon each of the following counsel of record for Respondent by depositing same in a United States post office, with first class postage prepaid, addressed to said counsel of record at their respective post office addresses, as follows:

HON. J. DOUGLAS McARTHUR
Crossland, Crossland, Caswell and Bell
Attorneys at Law
Guarantee Savings Building
1171 Fulton Mall
Fresno, California 93721

AND

HON. JAMES D. MADDOX
Attorney at Law
Post Office Box 29
Rome, Georgia 30161

This the 19 day of December, 1978.

Frank M. Gleason

FRANK M. GLEASON



## APPENDIX A

## OPINION OF THE DISTRICT COURT

(Filed March 17, 1978)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

NORA SWAFFORD,
Plaintiff

versus CA No. C77-152R

DICK AVAKIAN,
Defendant

### ORDER

This is an action for damages based on an alleged breach of contract to marry and fraudulent misrepresentation. Jurisdiction is invoked under 28 U.S.C. §1332 based on diversity of citizenship. Presently before the Court are defendant's motion to dismiss and motion for a protective order.

Among the grounds defendant relies on in his motion to dismiss is lack of personal jurisdiction. The defendant is a citizen and resident of California. He transacts no business in Georgia. The defendant was not served while physically present in Georgia. Plaintiff asserts that this Court may obtain personal

jurisdiction over the defendant through use of the Georgia Long-Arm Statute, Ga. Code Ann. §24-113.1. To support her contention that the defendant committed a "tortious act or omission within this State," the plaintiff submitted an affidavit stating that the defendant made numerous long distance phone calls to her, while she resided in Georgia, in which he proposed marriage. Further the plaintiff alleged in her complaint that the defendant sent letters to her in Georgia concerning his marriage proposal. The plaintiff contends that these phone calls and letters constitute a "tortious act" which took place in Georgia thus placing the defendant within this Court's personal jurisdiction.

The Georgia courts have set out a three fold test to determine the power of a forum state to exercise jurisdiction over a nonresident defendant. *Shellenberger v. Tanner,* 138 Ga. App. 399 (1976). The nonresident must purposefully avail himself of the privilege of doing some act or consummating some transaction with or in the forum. Secondly, the plaintiff must have a legal cause of action against the nonresident. Finally, if the first two requirements are met, a "minimum contact" between the nonresident and the forum must exist. *Id.* at 404-405. "What is required is a 'minimum contact' such that its use as the predicate for establishing in personam jurisdiction does not offend 'traditional notions of fair play and substantial justice' " *id.* at 405. *International Shoe Co. v. Washington,* 3266 [*sic*] U.S. 310 (1945).



Assuming for the moment that the present action satisfies the first two parts of the jurisdictional test, the Court must determine whether or not the exercise of its jurisdiction would be "reasonable" considering the connection of the defendant with Georgia. "The application of this [minimum contacts] rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla,* 357 U.S. 235, 253 (1958).

In the case at bar, the defendant was not physically present in Georgia. He conducted no business in Georgia. Ga. Code §113.1(c). He shipped no product into or through Georgia. *Coe and Payne Co. v. Wood Mosaic Corp.,* 230 Ga. 58 (1973); *Value Engineering Company v. Gisell,* 140 Ga. App. 44 (1976). The defendant's contact with Georgia was limited to placing several phone calls and mailing letters into the state, in which he espoused his love and affection for the plaintiff and proposed marriage. This was not the first nor the last proposal of marriage which the defendant made to the plaintiff. There is no showing that a contract to marry was entered into during one of the phone conversations. Rather the evidence supports the conclusion that these contacts were part of a blossoming romance rather than the finalization of an agreement. The existence of a personal relationship with a nonresident by a resident is an insufficient basis to support the exercise of

Georgia's long-arm jurisdiction. Concomitant with such a personal relationship are the exchange of phone calls and letters. The defendant has not had the requisite "minimum contacts" to enable Georgia to exercise its long-arm jurisdiction consistent with the due process notions of "fair play" and "substantial justice". *International Shoe*, supra at 316. Defendant's motion to dismiss is granted due to the Court's lack of in personam jurisdiction over the defendant.

Accordingly, the defendant's motion to dismiss is GRANTED. The defendant's motion for a protective order is now MOOT.

SO ORDERED, this the 16th day of March, 1978.

/s/ Harold S. Murphy
UNITED STATES
DISTRICT JUDGE



## JUDGMENT OF THE DISTRICT COURT

(Filed March 17, 1978)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

NORA SWAFFORD

versus CA No. C77-152R

DICK AVAKIAN

JUDGMENT

This action came on for consideration before the Court, Honorable Harold L. Murphy, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that plaintiff, NORA SWAFFORD recover nothing of defendant DICK AVAKIAN; that defendant recover of plaintiff his costs of action and that the case is dismissed.

Dated at Rome, Georgia, this 17th day of March, 1978.

BEN H. CARTER
Clerk of Court
/s/ Vivian VanLandingham
Deputy Clerk

## OPINION OF THE COURT OF APPEALS

(Dated October 16, 1978)

Nora SWAFFORD,
Plaintiff-Appellant,

versus

Dick AVAKIAN,
Defendant-Appellee.

No. 78-1803
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Oct. 16, 1978.

---

Appeal from the United States District Court for the Northern District of Georgia.

Before THORNBERRY, GEE and FAY, Circuit Judges.

PER CURIAM:

The sole question presented in this appeal is whether the district court was correct in dismissing appellant's action for lack of personal jurisdiction.

---

* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.



Appellant alleges that she met appellee in California while she was living there and where a relationship developed with appellee who proposed marriage to her. Thereafter, appellant became disenhanted with the situation and moved to Georgia where her parents resided. She further alleges that after she arrived in Georgia appellee made phone calls and wrote letters expressing his love for appellant and asking appellant to marry him. Appellant and her three children went back to California and moved into appellee's house. Shortly after her arrival in California, a formal engagement took place. Two weeks later, appellee terminated the engagement and appellant and her three children moved back to Georgia.

Appellant filed a complaint in the United States District Court for the Northern District of Georgia claiming damages arising out of an alleged breach of contract to marry and for fraudulent misrepresentation. Appellant sought to serve appellee with process in California under the Georgia Long-Arm Statute[1] and

---

1 Ga. Code Ann. 24-113.1. *Personal jurisdiction over nonresidents of State.* — A court of this State may exercise personal jurisdiction over any nonresident, or his executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use or possession enumerated in this section, in the same manner as if he were a resident of the State, if in person or through an agent, he:

(a) Transacts any business within this State; or
(b) Commits a tortious act or omission within this State, except as to a cause of action for defamation of character arising from the act; or
(c) Commits a tortious injury in this State caused by an act or omission outside this State, if the tortfeasor regularly does or solicits business, or engages in any

appellee filed a motion to dismiss on the grounds that the district court lacked personal jurisdiction. This motion was granted.

In this appeal, appellant alleges that the district court improperly dismissed the action for lack of personal jurisdiction under the Georgia Long-Arm Statute.

I. Breach of Contract

The first count of appellant's complaint is one for breach of contract to marry. There have been no allegations by appellant that subsections (a) or (d)[2] of Georgia's Long-Arm Statute are applicable. Instead, appellant relies upon subsections (b) and (c) to support both the count for breach of contract and the count for fraudulent misrepresentation. It is clear, however, that subsections (b) and (c) deal only with "tortious conduct." To base an action for breach of contract on either of these two subsections would be erroneous.

Nor can appellant properly allege jurisdiction over her contract claim on the basis of subsection (a) which contemplates the transaction of business within the

other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State; or

(d) Owns, uses or possesses any real property situated within this State.

2 Nothing on the record would support jurisdiction under subsection (d), dealing with real property, for either the contract count or the tort count.



state.[3] Activity under subsection (a) must be more extensive than activity which will support a finding of a "contract" with Georgia for the purpose of exercising jurisdiction in a tort claim under subsection (b). *Shellenberger v. Tanner*, 138 Ga.App. 399, 227 S.E.2d 266 (1976). In interpreting subsection (a), this Court held in *Pennington v. Toyomenka, Inc.*, 512 F.2d 1291 (5th Cir. 1975) that acts of transmitting communications from New York to Georgia by means of telephone and mail and sending goods into Georgia, paid by checks drawn on Atlanta banks, were not sufficient to acquire jurisdiction. *Id.* at 1292. In our case, the only contacts appellee was alleged to have had with Georgia were several phone calls and letters from California to appellant in Georgia. These contacts are insufficient for jurisdiction under subsection (a) as set out in *Pennington*.

II. Fraudulent Misrepresentation

The second count of appellant's complaint is a tort count for fraudulent misrepresentations allegedly made by appellee to appellant regarding his intention to marry her. Subsections (b) and (c) both deal with tortious conduct.[4]

3 We need not resolve the question of whether a contract to marry is a business transaction for purposes of subsection (a), for the requisite contacts with the State of Georgia for jurisdiction under this subsection are clearly not present in this case.

4 In *Coe & Payne Company v. Wood-Mosaic Corporation*, 125 Ga.App. 845, 189 S.E.2d 459 (1972) the Georgia Court of Appeals considered the applicability of subsection (c) to certain activities which took place prior to the amendment by the legislature which added

In interpreting subsection (b), the Court of Appeals of Georgia has set out a three-fold test:

> 1. The nonresident must purposely avail himself of the privilege of doing some act or consummating some transaction with or in the forum.
>
> 2. The plaintiff must have a legal cause of action.
>
> 3. If the first two requirements are met, the exercise of jurisdiction over the nonresident must be reasonable.

*Shellenberger v. Tanner*, 138 Ga.App. at 407, 227 S.E.2d at 272. The court in *Shellenberger* stated that "minimum contact" is required such that its use as the predicate for establishing personal jurisdiction does not offend "traditional notions of fair play and substantial justice." *Id.* In other words, the exercise of jurisdiction based upon minimum contact must be reasonable. This test for reasonableness has been frequently analogized to

subsection (c). It held that subsection (c) could not be applied retroactively. It further held that subsection (b) did not cover extraterritorial tortious conduct causing injury in Georgia. The Supreme Court of Georgia granted certiorari but did not pass on the issue of the retroactivity of subsection (c). Instead, it reversed the lower court's interpretation of subsection (b) saying: ". . . a 'tortious act' is a composite of both negligence and damage, and if damage occurred within the state then the tortious act occurred within the state within the meaning of subsection (b) of the Long Arm Statute." 230 Ga. 58 at 60, 195 S.W.2d 399 at 400-401.



that which is applicable in a forum non conveniens issue.[5] *Id.*

Clearly, to make appellee defend an action in Georgia, when he has never traveled to Georgia and where his only contact with Georgia were several phone calls and letters, would be unreasonable. Appellant lived in California, moved to Georgia and then moved back to California to live with appellee. The engagement and termination of the engagement took place in California. We believe the district court had ample grounds for finding that jurisdiction would not be reasonable under the facts alleged in this case.

5 Likewise, there is no jurisdiction under subsection (c). Referring to subsection (c), the court in *Shellenberger* used a reasonableness test and said:

> . . . For example, it is "reasonable"to subject a nonresident to suit in Georgia if, due to some purposeful activity here, he causes a tortious injury to a resident and if *in addition* he "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenues from goods used or consumed or services rendered in this State." Code Ann. § 24-113.1(c) . . . It is rather in those cases wherein the sole "contact" between the nonresident and the forum is the activity giving rise to the resident plaintiff's cause of action (and in those in which the nonresident's activities with or in the forum exceed a single transaction but do not rise to the level of the legal "fiction" standards) that the question of "reasonableness" in the exercise of jurisdiction takes on true independent significance.

*Shellenberger v. Tanner*, 138 Ga.App. at 405-406, 227 S.E.2d at 272-273.

If anything, it would appear to us the standard of "reasonableness" under subsection (c) would be stricter than that in subsection (b). See, e.g., *Thorington v. Cash*, 494 F.2d 582, 587 (5th Cir. 1974). We need not decide what parameters of "reasonableness" would be under subsection (c) since under any test of reasonableness, jurisdiction would be improper in this case.

Appellant has relied on the case of *Thorington v. Cash*, 494 F.2d 582 (5th Cir. 1974), to support appellant's position. In *Thorington*, appellant alleged that letters were sent and phone calls were made by appellee to appellant in Georgia and that on certain occasions appellee informed appellant he was calling from within the state of Georgia. Furthermore, the partnership agreement was mailed by appellee to appellant in Georgia who then executed the agreement, had it notarized and returned it by mail to appellee in Florida. This Court held in *Thorington* that appellee's contacts were sufficient to satisfy both subsection (b) of the Georgia Long-Arm Statute and the "minimum contacts" requirement of the Due Process Clause. However, this Court in *Thorington*, made it clear that its holding was limited "to the application of subsection (b) (tortious act within) to conduct which occurs prior to July 1, 1970, the effective date of subsection (c) (act without/tortious injury within)." *Id.* at 586. The Court stated:

> We do not determine whether Cash's contacts with Georgia would be sufficient to satisfy the seemingly more restrictive requirements of subsection (c) [footnote omitted] (conduct without/tortious injury within—post-1970) since we are *Erie*-bound by the Georgia Court of Appeals undisturbed ruling in *Coe & Payne* that subsection (c) does not apply retroactively.

*Id.* at 587.



Even if we were to disregard *Thorington's* limited applicability, there were more contacts in *Thorington* than in the case before us. For instance, no allegation was made in this case that appellee was ever in the state of Georgia as was the case in *Thorington*. A contract was not sent into Georgia by appellee nor was a contract executed, notarized and sent back to appellee as was the case in *Thorington*.

Furthermore, *Thorington* involved a commercial situation and is thus different from the non-commercial case before us. The recent United States Supreme Court decision in *Kulko v. Superior Court of California In and For the City and County of San Francisco*, ____ U.S. ____, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978) made a distinction between commercial and non-commercial activity for purposes of determining the scope of a state's long-arm statute.[6] As in *Kulko*, this is a non-commercial situation.

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6 In *Kulko v. Superior Court of California In and For the City and County of San Francisco*, ____ U.S. ____, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978) the husband and wife resided in New York, separated, and the wife then moved to California. Under the separation agreement signed in New York, the husband was to keep the children most of the year and was to send support checks to the wife's residence during the time the children were to be with the wife (Christmas, Easter and summer vacations). Both children eventually moved to California with their mother. The wife filed suit against the husband in California seeking an increase in child support payments. The California Supreme Court upheld lower-court determinations adverse to appellant concluding that California had personal jurisdiction over appellant. The United States Supreme Court held that the exercise of jurisdiction by California over appellant would violate the due process clause of the Fourteenth Amendment. The Court followed *Hanson v. Denkla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958) stating that the unilateral ac-

The act of sending love letters and making phone calls cannot be said to connote an intent to obtain nor expectancy of receiving a corresponding benefit from Georgia that would make fair the assertion of that state's jurisdiction over appellee.

Accordingly, we find the district court was correct in holding that the courts of Georgia have no personal jurisdiction over appellee in California.

AFFIRMED.

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tivity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state and that the defendant must have purposefully availed himself of the privilege of conducting activities within the forum state. The Court in *Kulko* further stated that a father who agrees to allow his children to spend more time in California than was required under a separation agreement, cannot be said to have availed himself of the benefits and protection of California laws. 98 S.Ct. at 1698. The Supreme Court stated that the fact that the husband had previously been in California on several occasions did not subject him to jurisdiction in California. The circumstances in *Kulko* would render unreasonable California's assertion of personal jurisdiction. There was no claim that appellant had caused physical injury on either property or persons within the state of California.

> . . . the mere act of sending a child to California to live with her mother is not a commercial act and connotes no intent to obtain nor expectancy of receiving a corresponding benefit in the State that would make fair the assertion of that State's judicial jurisdiction.



## JUDGMENT OF THE COURT OF APPEALS

(Entered October 16, 1978)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 78-1803
Summary Calendar

---

D. C. Docket No. C77-152R

NORA SWAFFORD,
Plaintiff-Appellant,

versus

DICK AVAKIAN,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

Before THORNBERRY, GEE and FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

October 16, 1978

Issued As Mandate: Nov. 7, 1978

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

## No. 78-1019

NORA SWAFFORD,

Petitioner,

versus

DICK AVAKIAN,

Respondent.

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-1019

NORA SWAFFORD,
Petitioner,

versus

DICK AVAKIAN,
Respondent.

# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

## PETITIONER HAS STATED NO REASON FOR GRANTING WRIT OF CERTIORARI.

Petitioner's alleged reason for granting the writ of certiorari is that the Fifth Circuit Court of Appeals rendered a decision in conflict with previous decisions of that Court and of this Court and in so doing, decided an important state question in a way that conflicted with applicable state law.

This case involves the application of the Georgia Long Arm Statute in a suit by plaintiff, allegedly a Georgia citizen, against a resident of California for breach of a contract of marriage.

This case does not fall within the provisions of this Courts Rule 19(b). The decision of the Fifth Circuit does not modify, or restrict use of, or application of the Georgia Long Arm Statute. It only concerns application of the particular facts in this case. It does not decide an important state or territorial question in a way in conflict with applicable state or territorial law. The decision below is not in conflict with any decisions of this Court.

The petition for certiorari rather than setting out reasons for granting the petition merely reargues the merits of the case which was decided below.

## ARGUMENT AND CITATION OF AUTHORITIES

Petitioner states "on November 9, 1977, Mrs. Swafford filed a two count complaint for damages against Avakian in the United States District Court for the Northern District of Georgia, Rome Division. Count One sounded in contract for a breach of a marriage promise under Georgia law; Count Two sounded in tort for fraudulent misrepresentation."

Mrs. Swafford, cites *Shellenburger v. Tanner* (1976), 138 Ga. App. 399, (227 SE2d 266). This opinion confines its



discussion to Ga. Code Ann. §24-113.1(b) and its application. The three-prong test referred to in her petition concerns application of subsection (b) to a person who "commits a tortious act or omission within this State". This section has no application to a suit for breach of a contract. The Court of Appeals of Georgia made clear at page 411 that the provisions of section (b) were not as extensive as were the requirements of subsection (a) applicable to a contract action.

The test in *Shellenburger* requires that there be a legal cause of action against the defendant in addition to a finding of an injury in Georgia resulting from a tortious act in Georgia. The Court of Appeals of Georgia in that case held there was not sufficient contact with the State by the individual defendants to satisfy even the lesser requirements of subsection (b). Regarding the corporate defendant, the Court held the allegations of the complaint were not sufficient to support allegations of negligence in failing to transfer records and/or fraudulent deceit in concealing a material fact.

Count Two of the complaint is also based upon Avakian's proposal of marriage alleging he had no intention to comply with such promise. Mrs. Swafford cannot convert a breach of contract into a tort merely by alleging the defendant did not intend to comply with the contract.

The Courts of Georgia have consistently held that fraud cannot be predicated upon statements which are

promissory in their nature as to future acts. False representations which authorize an action for fraud and deceit must be made with reference to existing or past facts and not to future acts. See *S & S Builders, Inc. v. Equitable Investment Corporation* (1964), 219 Ga. 557, (134 SE2d 777), where the Court held at page 564:

> "4. The petition attempts to allege that defendant fraudulently induced plaintiff to sign the written instruments by promising plaintiff that defendant in the future would reduce the oral construction loan agreement to writing and recognize its existence and validity. 'Fraud can not be predicated upon statements which are promissory in their nature as to future acts.' *Jackson v. Brown,* 209 Ga. 78 (70 SE2d 756). 'Representations which authorize an action for fraud and deceit must be made with reference to existing or past facts and not to future acts.' *Monroe v. Goldbert,* 80 Ga. App. 770, 775 (57 SE2d 448), 'Ordinarily, promises to perform some act in the future will not amount to fraud in legal acceptation, although subsequently broken without excuse.' *Rogers v. Sinclair Refining Co.,* 49 Ga. App. 72, 74 (174 SE 207). It follows the allegations in the petition are not such as to authorize an action for fraud to be based upon them . . . *Beach v. Fleming,* 214 Ga. 303, 306 (104 SE2d 427)."



The complaint and the affidavit of Mrs. Swafford establish that any contract to marry entered into by the parties was one to be performed in California at some indefinite time in the future. Plaintiff alleges she left Georgia and traveled to California, arriving June 8, 1977, that on June 19, 1977, defendant gave a dinner party announcing his "approaching marriage to plaintiff". About two weeks passed and plaintiff was uneasy because "no wedding date had been set". She finally alleges that on June 30, 1977, the defendant told her the "engagement was off" and that she immediately left California for Georgia.

There is no cause of action in California for fraudulent promises to marry or for breach of contract to marry. California Civil Code §43.4 provides: "A fraudulent promise to marry or to cohabit after marriage does not give rise to a cause of action for damages." California Civil Code §43.5 provides: "No cause of action arises for: (a) alienation of affection; (b) criminal conversation; (c) seduction of a person over the age of legal consent; (d) breach of promise of marriage." In this regard, see also Witken, *Summary of California Law,* 8th Edition, pages 2722-2724, discussing representations involving promise of marriage.

Mrs. Swafford, is strenuously trying to avoid California law by bringing this action in Georgia. She contends in the complaint that a contract of marriage occurred May 9, 1977, when the defendant in California telephoned her at her home in Catoosa County,

Georgia. Her affidavit reveals she lived in California from August 16, 1962, until the early part of April 1977.

The complaint in paragraph 4 alleges "Their friendship blossomed into a romance and defendant proposed marriage, plaintiff agreed, but defendant delayed for reasons asserted by him. In early April of 1977 plaintiff, disillusioned by defendant's attitude, returned to her native state of Georgia, arriving there on April 9, 1977." It appears there was a contract to marry entered into in California. She does not allege when this agreement was made but was obviously after January, 1976, when she says he first called her. She does state that she was the one who became disillusioned and left the defendant in California.

Even after reaffirmation of the contract alleged to have been made May 9, 1977, there was never a marriage date agreed to by the parties. If there was any breach of the marriage contract, it occurred in California after her arrival on June 8, 1977. Paragraph II alleges "Plaintiff was uneasy because no wedding date had been set." She says in paragraph 12 of the complaint the defendant on June 30, 1977, told her the "engagement was off". Paragraph 13 alleges she then left California for Georgia.

The Court was correct in dismissing the complaint as to Count One upon two grounds: (a) Plaintiff does not have any cause of action against the defendant for



The only basis for applying the Georgia Long Arm Statute to the defendant in a suit for breach of contract would be subsection (a) of the statute. Subsection (a) requires the finding of an activity amounting to a "transaction of business" within the State of Georgia. As pointed out by the Court of Appeals in *Shellenburger v. Tanner* (1976), 138 Ga. App. 399, (277 SE2d 266) at 411, this activity must be more extensive than an activity which will support a finding of a "contact" with breach of promise to marry; (b) The defendant did not transact any business in Georgia.

The Georgia Courts have long held that a contract made in one state to be performed in another state will be governed by the laws of the state of performance. Supreme Court of Georgia in *Vanzant, Jones & Company v. Arnold, Hamilton & Johnson* (1860), 31 Ga. 210, at page 213, ruled: "In such cases, that is, when the contract is made in one place, and to be performed in another, it is a well settled rule, that the contract, in conformity to the presumed intention of the parties, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance." More recently, that Court in *Pacolet Manufacturing Company v. Crescent Textiles, Inc.* (1963), 219 Ga. 268 (133 SE2d 96), held: "It is likewise the settled rule in this state that when a contract is made in one place to be performed in another, the contract, in conformity with the presumed intention of the parties, is to be governed by the law of the place of performance."

Georgia for the purpose of exercising jurisdiction in a tort action under subsection (b).

It is apparent subsection (a) uses the term "business" in the commercial and mercantile sense and is not intended to include a purely personal transaction. In a decision some four years after adoption of a Georgia Long Arm Statute containing language in subsection (a) identical to the language in the statute today, the Court of Appeals of Georgia in *Carey v. Linares* (1970), 121 Ga. App. 150 (173 SE2d 101), held a judgment obtained in Missouri against a Georgia resident was void because of lack of jurisdiction. In that case, a Georgia resident wrote to a Missouri resident asking for the loan of $1,500.00. The plaintiff sent the money to the Georgia resident. When it was not repaid, plaintiff filed suit in the local magistrate's court in Missouri and obtained service under the Missouri long arm statute. The Court of Appeals held:

> "We believe the Missouri court would hold that their statute was not intended to apply to a purely private, relatively modest transaction between individuals where the defendant was never physically present within the state and where the only 'contact' was established by an artificial, 'place of contract' rule designed for conflict of law purposes. See *O'Neal Steel, Inc. v. Smith*, 120 Ga. App. 106 (169 SE2d 827).
>
> "To hold otherwise would be to deny such defendants, for all practical purposes, the opportunity to be heard. With no insurance company or corporation to bear the costs of out-of-state litigation as a routine business expense, default judgments would be the rule. We believe that in its application to this type of situation, the statute would offend traditional notions of fair play and substantial justice."



"Business" has consistently been defined by the courts in terms of its ordinary sense as being related to matters concerned with earning a living. *Snow v. Johnston* (1943), 197 Ga. 146 (28 SE2d 270); *Flynt v. Stone Tracy Company* (1910), 220 U.S. 107.

*Kulko v. Superior Court of California In and For the City and County of San Francisco*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978) cited by the Fifth Circuit supports this distinction between commercial and non-commercial activities.

Petitioner relies upon *Thorington v. Cash* (5th Cir. 1974), 494 F2d 582. That decision concerned application of subsection (b) to a nonresident who allegedly sent by mail, or telephone, or both, fraudulent misrepresentations upon which he intended that plaintiffs rely in entering into a limited partnership; and, who allegedly obtained such reliance thus committing a "tortious act" in Georgia, subjecting him to jurisdiction under the Georgia long arm statute, Code 24-113.1(b). There were allegations of misrepresentation of existing facts unlike the instant case.

An action for breach of promise is an action on breach of contract. *Harris v. Tisom* (1879), 63 Ga. 629. This case is thus controlled by the decisions in *Fulghum Industries, Inc. v. Walterboro Forest Products, Inc.* (5th Cir. 1973), 477 F2d 910, and *Pennington v. Toyomenka, Inc.* (5th Cir. 1975), 512 F2d 1291. *Fulghum Industries, Inc.*, held that the Georgia long arm statute was not applicable in that action for breach of contract. This was ruled even though as part of the negotiations for the contract executed by parties in their respective states, officers of defendant corporation had visited the Georgia plant of plaintiff and other sawmills erected by plaintiff in Georgia and there had been numerous telephone calls and mail communications related to the contract between the Georgia plaintiff and the South Carolina defendants.

In the *Pennington* case the Court held that a business corporation which transmitted communications from New York to Georgia by means of telephone and mail, which sent goods into Georgia and was paid by checks drawn on a Georgia bank had not "transacted business" within Georgia long arm statute where it had never had an agent or employee located in Georgia, had never manufactured any product in Georgia, and had never been domesticated or authorized to conduct business in Georgia. The company was not subject to in personam jurisdiction in Georgia even though the corporation had sent agents into Georgia to meet with the Georgia Company concerning the accounts in issue after consummation of the business and prior to filing the complaint.



See also the decision of Chief Judge Lawrence in *Interstate Paper Corporation v. Air-O-Flex Equipment Company* (S.D. Ga. 1977), 426 F.Supp. 1323. Judge Lawrence stated that in Georgia, to maintain a suit in tort arising out of a contract the breach of duty must be one imposed by law and not merely by the contract itself. He went on to rule that a foreign corporation which fabricated and shipped materials and components for a wood chip dumper to Georgia F.O.B. Minneapolis could not be served under Ga. Code Ann. § 24-113.1(a). He held said subsection was applicable to actions on contract and the defendant corporation did not transact business in Georgia although there had been negotiations between plaintiff and defendant by mail.

Any question about the correctness of the rulings of the District Court and the Fifth Circuit in this case should have been laid to rest by the Court of Appeals of Georgia in *Berry v. Jeff Hunt Machinery Company*, 148 Ga. App. 35, ___SE2d___ (1978). The Court held a South Carolina judgment against Berry, a Georgia resident was void for lack of jurisdiction. The decision was based upon Georgia law. The Court ruled:

> "3. On motion for summary judgment, the uncontroverted facts show that Berry traveled to South Carolina to discuss with Hunt the lease of heavy equipment, and thereafter other negotiations apparently transpired over the telephone and via the mails. Two pieces of equipment were shipped

to Georgia and a third piece of equipment was picked up by Berry in South Carolina. All lease payments were sent to Hunt's office in South Carolina. The facts are in conflict as to whether the subject matter of this case (the actual pieces of machinery ultimately leased by the appellant) were discussed in South Carolina; however, the leases themselves were sent to and signed by the appellant in Georgia. Finally, the appellant returned for repairs one of the leased pieces of equipment to the appellee in South Carolina.

"For purposes of 'long-arm' jurisdiction, '[m]ailing or telephoning orders to another state does not of itself constitute the transaction of any business . . .' *Process Systems v. Dixie Pkg. Co.*, supra, p. 456. Similarly, where there are no negotiations or contracts entered into in the forum state, with respect to the goods that are the subject matter of the litigation, there have not been sufficient 'contacts' with the forum state to comply with the 'transacting business' requirement of Georgia Long Arm Statute. *O.N. Jonas Co. v. B & P Sales Corp.*, 232 Ga. 256 (206 SE2d 437). On the facts presented on motion for summary judgment, the activities of the appellant in the forum state did not satisfy the 'minimum contacts' requirement of the Georgia Long Arm Statute, a prerequisite to the establishment of extraterritorial jurisdiction, and a foreign



judgment shall not be recognized by the courts of this state if the foreign court did not have personal jurisdiction over the defendant. Code Ann. §110-1304(b); *Boggus v. Boggus*, supra. Accordingly the trial court erred in entering summary judgment in favor of the appellee."

## CONCLUSION

It is respectfully submitted the District Court was correct in dismissing the action for lack of personal jurisdiction over the defendant. Petitioner has shown no reason why the petition for writ of certiorari should be granted and the petition should be denied.

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## CERTIFICATE OF SERVICE

I hereby certify that I am of counsel for DICK AVAKIAN in the above-stated case and that I have served the above and foregoing Respondent's Brief in Opposition To Petition For Certiorari, upon Petitioner, Nora Swafford, by mailing three copies thereof to Mr. Frank M. Gleason, Attorney at Law, 102 Howard Street, Rossville, Georgia 30741, attorney for petitioner, in a properly addressed envelope with sufficient postage affixed thereon.

This 26 day of February, 1979.

JAMES D. MADDOX
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ROME, GEORGIA

JAMES D. MADDOX